



RONALD CHAPMAN, MD, MPH
Director & State Health Officer

State of California—Health and Human Services Agency
California Department of Public Health



EDMUND G. BROWN JR.
Governor

AFL REVISION NOTICE

Subject: Elder Justice Act Reporting Requirements
Revision To: AFL 11-40
Revision Date: March 23, 2012
Attachment: AFL 12-01

This notice is to inform you that the California Department of Public Health (CDPH) has replaced All Facilities Letter (AFL) 11-40 with the attached AFL 12-01.

The revised AFL highlights that the Elder Justice Act reporting requirements do not supersede the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) for the “long term care facilities” defined in Welfare and Institutions Code Section 15610.47.

Please review AFL 12-01 and contact your local District Office if you have further questions.



RONALD CHAPMAN, MD, MPH
Director & State Health Officer

State of California—Health and Human Services Agency
California Department of Public Health



EDMUND G. BROWN JR.
Governor

March 23, 2012

AFL 12-01
(Supersedes AFL 11-40)

TO: All Long-Term Health Care Facilities
All Hospices

SUBJECT: Elder Justice Act Reporting Requirements - Revision

Summary

The Patient Protection and Affordable Care Act of 2010 (Public Law 111-148) established the Elder Justice Act of 2009 (EJA) reporting requirements in Section 1150B of Title XI of the Social Security Act. The Centers for Medicare & Medicaid Services (CMS) issued and revised S&C 11-30-NH on June 17, 2011 and August 12, 2011, entitled, "Reporting to Law Enforcement of Crimes Occurring in Federally Funded Long-Term Care Facilities" (attached). This All-Facility Letter (AFL) provides information concerning compliance with these new requirements.

Effective Date: These instructions take effect immediately.

Reporting Suspicion of a Crime: The EJA requires specific individuals in long-term health care facilities (LTHCFs) to report any "reasonable suspicion" of crimes committed against "any individual who is a resident of, or is receiving care from, the facility." (42 U.S.C. §1320b-25(b)(1)).

Applicability: The EJA reporting requirements are applicable to LTHCFs as defined in 42 U.S.C. §1397j(15) that receive Medicare and Medicaid funding under the Social Security Act, and according to S&C: 11-30-NH also Hospices that provide services at LTHCFs and Intermediate Care Facilities for the Mentally Retarded (ICFs/MR). The EJA does not supersede the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) for the "long term care facilities" defined in Welfare and Institutions Code Section 15610.47. The reports required by the EJA must be submitted to at least one local law enforcement agency of jurisdiction and the Department of Public Health Licensing and Certification Program (L&C). An incident in a skilled nursing facility that results in a report of "elder abuse" to the Ombudsman may also result in an EJA report to L&C and local law enforcement.

Processing Reports about Suspected Crimes: L&C will process EJA reports using existing CMS and State policies and procedures for reporting incidents and complaints. Until CMS issues EJA specific regulations, L&C will only cite facilities for violations of existing statutes and regulations.

Covered Individual Reporting: Each covered individual is responsible to ensure that his or her individual reporting responsibility is fulfilled. Multiple covered individuals, each of whom has a reporting responsibility, may file a single report to the local L&C district office that includes information about the suspected crime. L&C will treat multiple reports concerning the same incident as a single complaint incident.

REQUIREMENTS

Any LTHCF that received at least \$10,000 in Social Security funds during the preceding year must annually notify each "covered individual" of their obligation to report to L&C and at least one local law enforcement entity "any reasonable suspicion of a crime," as defined by local law, committed against an individual who is a resident of, or is receiving care from, the LTHCF. A "covered individual" is each individual who is an owner, operator, employee, manager, agent, or contractor of the LTHCF (42 U.S.C. §1320b-25(a)(3)).

Covered individuals must timely report *any reasonable suspicion of a crime* against a resident of, or who is receiving care from, a LTHCF. If the events causing the reasonable suspicion result in serious bodily injury, the report must be made immediately after forming the suspicion (but not later than two hours after forming the suspicion) (42 U.S.C. §1320b-25(b)(2)(A)). For example, if a covered individual observes events that cause serious bodily injury at 1:00 am on Sunday morning, the report to L&C and at least one law enforcement entity must take place by 3:00 am.

If the events that cause the reasonable suspicion do not result in serious bodily injury to a resident, the covered individual shall report the suspicion not later than 24 hours after forming the suspicion (42 U.S.C. §1320b-25(b)(2)(B)).

Covered individuals are subject to a civil money penalty and can be excluded from participation in any Federal health care program if they fail to meet the reporting obligations of the statute (42 U.S.C. §1320b-25(b)). LTHCFs that employ such an excluded individual become ineligible for Federal funds for the time the excluded individual is employed. LTHCFs are also subject to a civil money penalty or exclusion sanctions for retaliating against any employee who makes or is taking steps toward making a lawful report (42 U.S.C. §1320b-25(d)(2)). CMS guidance about the civil money penalty component of the EJA is not yet complete.

LTHCF Responsibilities

All Medicare or Medicaid participating LTHCFs must:

- Determine annually whether the facility received at least \$10,000 in federal Social Security funds during the preceding fiscal year (42 U.S.C. §1320b-25(a)(1));
- Annually notify each covered individual of that individual's reporting obligations if the facility determines that it received at least \$10,000 in such funds (42 U.S.C. §1320b-25(a)(2));
- Conspicuously post a notice for its employees specifying the employees' rights, including the right to file a complaint under the EJA. The notice must include a statement that an employee may file a complaint with L&C against a LTHCF and prohibits retaliation against an employee as specified above, as well as include information with respect to the manner of filing such a complaint (42 U.S.C. §1320b-25(d)(3)), and;
- Not retaliate against an individual who lawfully reports a reasonable suspicion of a crime under the EJA. The facility may not discharge, demote, suspend, threaten, harass, or deny a promotion or other employment-related benefit to an employee, or in any other manner discriminate against an employee in the terms and conditions of employment because of lawful acts done by the employee, or file a complaint or a report against a nurse or other employee with the appropriate state professional disciplinary agency because of lawful acts done by the nurse or employee (42 U.S.C. §1320b-25(d)(1)).

A facility that effectively implements the EJA is advised to:

- Review existing facility policies and procedures to ensure adherence to existing CMS and State policies and procedures for reporting incidents and complaints;

For example: A facility should already have policies and procedures in place to report abuse, neglect or misappropriation of resident property. During the course of a standard survey or complaint investigation, the identification of a possible crime may trigger a review of existing policies and procedures.

- Coordinate with the facility's State and local law enforcement entities to determine what actions are considered crimes in their political subdivision, and;
- Develop policies and procedures for EJA compliance that include prohibiting retaliation against any employee who makes a report, causes a lawful report to be made, or takes steps in furtherance of making a lawful report pursuant to the requirements of the statute. Facilities are reminded that their procedures should include the retention of proof that reports under the EJA were properly submitted.

- Facilities could use the Form SOC 341(Report of Suspected Dependent Adult/Elder Abuse) for reporting EJA incidents. However, EJA reporting applies to *any individual* who is a resident of, or is receiving care from, the facility and not just the elderly or dependent adults. Further, while many of the fields on the SOC 341 are required under state law, the EJA doesn't specify any specific information that must be reported. In addition, the timeframes for reporting an EJA incident differ from the EADACPA. Also note that the EJA is not limited to the crimes listed on the SOC 341. Similarly, a facility is not prohibited from using a form SS 8572 (Suspected Child Abuse Report) to report an EJA incident if they are mindful of the EJA differences.
- A copy of California Penal Code Section 368 that is applicable to EADACPA reporting is attached to illustrate the difference with the EJA. Most significantly, the EADACPA provisions only apply to incidents perpetrated upon elderly or dependent adults.

Facilities are responsible for following all applicable laws. The California Department of Public Health's failure to expressly notify facilities of statutory or regulatory requirements does not relieve facilities of their responsibility for following all laws and regulations. Facilities should refer to the full text of all applicable sections of the Health and Safety Code and Title 22 of the California Code of Regulations.

If you have any questions, please contact your respective L&C district office.

Sincerely,

Original signed by Debby Rogers

Debby Rogers, RN, MS, FAEN
Deputy Director
Center for Health Care Quality

Attachment

ATTACHMENT for AFL 12-01

California Penal Code

368. (a) The Legislature finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf.

(b) (1) Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed six thousand dollars (\$6,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or four years.

(2) If in the commission of an offense described in paragraph (1), the victim suffers great bodily injury, as defined in Section 12022.7, the defendant shall receive an additional term in the state prison as follows:

(A) Three years if the victim is under 70 years of age.

(B) Five years if the victim is 70 years of age or older.

(3) If in the commission of an offense described in paragraph (1), the defendant proximately causes the death of the victim, the defendant shall receive an additional term in the state prison as follows:

(A) Five years if the victim is under 70 years of age.

(B) Seven years if the victim is 70 years of age or older.

(c) Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health may be endangered, is guilty of a misdemeanor. A second or subsequent violation of this subdivision is punishable by

ATTACHMENT for AFL 12-01

a fine not to exceed two thousand dollars (\$2,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

(d) Any person who is not a caretaker who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, or who violates Section 530.5 proscribing identity theft, with respect to the property or personal identifying information of an elder or a dependent adult, and who knows or reasonably should know that the victim is an elder or a dependent adult, is punishable as follows:

(1) By a fine not exceeding two thousand five hundred dollars (\$2,500), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, or by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years, or by both that fine and imprisonment, when the moneys, labor, goods, services, or real or personal property taken or obtained is of a value exceeding nine hundred fifty dollars (\$950).

(2) By a fine not exceeding one thousand dollars (\$1,000), by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, when the moneys, labor, goods, services, or real or personal property taken or obtained is of a value not exceeding nine hundred fifty dollars (\$950).

(e) Any caretaker of an elder or a dependent adult who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, or who violates Section 530.5 proscribing identity theft, with respect to the property or personal identifying information of that elder or dependent adult, is punishable as follows:

(1) By a fine not exceeding two thousand five hundred dollars (\$2,500), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, or by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years, or by both that fine and imprisonment, when the moneys, labor, goods, services, or real or personal property taken or obtained is of a value exceeding nine hundred fifty dollars (\$950).

(2) By a fine not exceeding one thousand dollars (\$1,000), by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, when the moneys, labor, goods, services, or real or personal property taken or obtained is of a value not exceeding nine hundred fifty dollars (\$950).

(f) Any person who commits the false imprisonment of an elder or a dependent adult by the use of violence, menace, fraud, or deceit is punishable by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

(g) As used in this section, "elder" means any person who is 65 years of age or older.

ATTACHMENT for AFL 12-01

(h) As used in this section, "dependent adult" means any person who is between the ages of 18 and 64, who has physical or mental limitations which restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age. "Dependent adult" includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

(i) As used in this section, "caretaker" means any person who has the care, custody, or control of, or who stands in a position of trust with, an elder or a dependent adult.

(j) Nothing in this section shall preclude prosecution under both this section and Section 187 or 12022.7 or any other provision of law. However, a person shall not receive an additional term of imprisonment under both paragraphs (2) and (3) of subdivision (b) for any single offense, nor shall a person receive an additional term of imprisonment under both Section 12022.7 and paragraph (2) or (3) of subdivision (b) for any single offense.

(k) In any case in which a person is convicted of violating these provisions, the court may require him or her to receive appropriate counseling as a condition of probation. Any defendant ordered to be placed in a counseling program shall be responsible for paying the expense of his or her participation in the counseling program as determined by the court. The court shall take into consideration the ability of the defendant to pay, and no defendant shall be denied probation because of his or her inability to pay.